

**PRELIMINARY DRAFT
FOR DISCUSSION PURPOSES ONLY**

**CALFED BAY-DELTA PROGRAM
MULTI-SPECIES CONSERVATION STRATEGY**

**Proposed Assurances for Cooperating Landowners,
Local Agencies, and Other Private Interests**

It is anticipated that CALFED will establish some type of governance structure and an assured revenue stream to fund ecosystem restoration and conservation activities in future years. A multi-species conservation strategy is critical to the successful governance and financing of conservation and restoration activities. The following outlines a suggested assurances program for the landowners, public agencies and other private organizations whose active participation and collaboration with CALFED will be essential for the success of a multi-species conservation strategy. The assurances program provides the critical avenue through which ecosystem conservation and restoration can occur in harmony with the needs of landowners, counties, local agencies, and other private interests.

1. *General Conservation Program.* These assurances would apply to landowners who allow restoration projects on their lands, who own/farm lands that are within a reasonable radius (depending on species) of a wildlife refuge or restoration project, or who are within a watershed that is being restored (e.g., Battle Creek). These assurances would apply to local public agencies (typically special districts, but could include counties or cities) with restoration projects within their boundaries or located where those restoration activities could affect the operations of the local public agency. Finally, the assurances would also apply to mutual water companies or other private organizations (generally referred to as "other private interests") that wish to participate in conservation or restoration activities or whose operations might be affected by such activities.
1. *Assurances to Landowners/Local Public Agencies/Other Private Interests.*
 1. *Voluntary Participation.* Participation in the CALFED Bay-Delta Program shall be strictly voluntary. Landowners, local public agencies or

other private interests may withdraw at any time and shall not suffer any penalty or disincentive for withdrawing from the Program. Withdrawing landowners, local public agencies, or other private interests shall not be required to mitigate for their withdrawal or be deemed to have taken members of a covered species as a result of their withdrawal from the Program.

2. *Incremental Costs Borne by CALFED.* The incremental costs to a landowner, local public agency, or other private interest of participating in CALFED activities shall be borne by CALFED agencies.
3. *Private Property Rights.* All parties will fully respect private property rights of landowners. Agency personnel will not enter upon private lands without the express permission of the landowner or manager, save in cases of bona fide emergencies.
4. *Confidentiality.* All information provided by a landowner relating to the implementation of the Program will be kept strictly confidential and shall not be subject to disclosure under either the Freedom of Information Act or the Public Records Act. In addition, waiver of this right to confidentiality shall not be a condition for landowners to participate in the Program.
5. *Right to Farm.* Landowners participating in the Program (and their neighbors) will be able to modify their cultural practices (including changing cropping patterns) freely, as long as they are engaged in routine and ongoing agricultural activities. In the case of disputes regarding whether a landowner is engaged in normal and customary farming or ranching practices, the Program will be guided by the consensus of a panel of experts composed of technical personnel from the U.C. Cooperative Extension, the California Farm Bureau, the California Farm Service Agency, Natural Resources Conservation Service, and the local Farm Bureau.
6. *Monitoring.* Monitoring and site-specific surveys of the results of the Program will occur in the manner that is least intrusive to the landowner in question. The landowner, local public agency, or other private interest may undertake self-reporting of progress, may retain his/her own biologists to perform such work, may permit agency personnel to conduct monitoring or site-specific surveys, or may work with the agencies to develop a reasonable monitoring program or site-specific surveys.
7. *Incidental Take Authorization.* Landowners, local public agencies, or

other private interests participating in the Program (and their neighbors) will be given incidental take authority under section 10 of the federal Endangered Species Act for the incidental or accidental take of covered species, provided that the take is the result of routine and ongoing agricultural activities or results from inadvertent or ordinary negligent acts that occur on a farm or ranch in the course of routine and ongoing agricultural activities. In the case of local public agencies or other private interests, incidental take authority will extend to the routine and ongoing activities of that agency or company

8. *Liability Protection.* CALFED and/or its member agencies agree to indemnify, defend, and hold landowners, local public agencies, and other private interests harmless for any losses that may occur as a result of a landowner, local public agency, or other private interest allowing restoration activities on private or agency property.
9. *In-Lieu Fees.* CALFED and its member agencies recognize that local governments depend upon property taxes, special assessments, property fees, and other similar financing mechanisms to provide operating revenues. In connection with any lands that are acquired for restoration purposes, CALFED and its member agencies agree to pay in-lieu fees to local public agencies (including cities, counties and special districts) that are equal to the payments made by the private landowner prior to public acquisition.
10. *No Criminal or Civil Penalties.* CALFED, its member agencies, and the United States and the State of California all agree that they will not seek criminal or civil remedies against participating landowners (or their neighbors), local public agencies, or other private interests for routine and ongoing agricultural activities or activities that are authorized by the Program or for local public agencies or other private interests' routine and ongoing activities.
11. *Net Benefit to the Environment.* CALFED and its member agencies recognize that it is important to offer landowners, local public agencies, and other private interests incentives to participate fully and actively in the restoration activities proposed by CALFED. To this end, landowners, local public agencies, and other private interests participating with CALFED will not be subject to the typical mitigation requirements established under the federal or California endangered species acts for impacts on listed species. Instead, as long as these parties' projects result in a net benefit to the environment, these parties will not be subject to the typical mitigation requirements.

For instance, suppose District X wishes to construct a fish screen. As part of that project, it will take a certain number of other listed species. If the net benefits to the environment – taken as a whole – of screening exceed the losses of other listed species, the District will not need to engage in any mitigation for the construction of the fish screen. Or, suppose that an agency wishes to build a number of small flood control facilities that will take listed species in conjunction with the construction of new riparian or wetlands habitat. As long as the proposed program – taken as a whole – yields a net benefit to the environment, the program will not need to mitigate for its acknowledged adverse impacts on certain listed species. Of course, a typical developer who does not propose to link a proposed residential development with any restoration activities would still be subject to the current mitigation requirements.

12. *Other Permits and Activities.* CALFED and its member agencies recognize that they issue a large number of permits that regulate the activities of individuals, public agencies or mutual water companies. For instance (and without limitation), CALFED agencies issue permits under section 10 of the Rivers and Harbors Act, sections 401 and 404 of the Clean Water Act, the California Endangered Species Act, and sections 1601 and 1603 of the California Fish and Game Code. Each of these permits that is issued in connection with activities intended to implement the CALFED Bay-Delta Program will incorporate all of the assurances contained in this policy. In addition, CALFED and its member agencies are engaged in a wide variety of other activities that are intended to assist in implementing the conservation strategy (e.g., activities implementing the Central Valley Project Improvement Act). These activities will also be carried out in a manner consistent with this assurances policy.

2. *Assurances to CALFED Agencies.*

1. *Landowners.* Participating landowners will not interfere with restoration activities on their lands or on neighboring lands. Landowners will, to the extent reasonably practicable and consistent with their other use(s) of their property, facilitate restoration activities on their lands.
2. *Local Public Agencies and Other Private Interests.* Participating local public agencies and other private interests will not interfere with restoration activities within their jurisdiction. Local public agencies and other private interests will, to the extent reasonably practicable and consistent with their other activities, facilitate restoration activities on lands within their jurisdiction.

2. *Special Assurances for Levee Maintenance and Repair.* These special assurances would apply to local flood control districts (reclamation districts, levee districts, special act districts, and others) that operate and maintain flood control works. These assurances would also apply to the State of California when it undertakes to operate or maintain levees in the Central Valley. These assurances refine the general discussion of assurances that would apply to all CALFED activities.

1. *Assurances to Flood Control Districts.*

1. *Incremental Costs Borne by CALFED.* The incremental costs to a local public agency of levee maintenance and repair activities shall be borne by CALFED agencies.
2. *Liability Protection.* CALFED and/or its member agencies agree to indemnify, defend, and hold local public agencies harmless for any losses that may occur as a result of a local public agency allowing restoration activities. This indemnification would include, but would not be limited to: (1) recreational activities (e.g., waterskiers or jet skis), (2) impacts on channel capacity or channel roughness, (3) erosion due to plantings.
3. *Priority of Flood Control Activities.* Local public agencies with responsibility for flood protection will be able to engage in all activities necessary for the proper operation and maintenance of flood control facilities and so will fulfill their responsibilities to protect public safety.
4. *Incidental Take Authorization.* Local public agencies participating in the Program will be given incidental take authority under section 10 for the incidental or accidental take of covered species, provided that the take is the result of the routine and ongoing activities of that agency. Authorized practices for flood protection will be specified in a revision of the Corps of Engineers' operation and maintenance manual.
5. *Net Benefit to the Environment.* Projects proposed by flood control districts would be evaluated under the net benefit to the environment principles described above. For instance, a district proposing to widen its levee in conjunction with the creation of shaded riverine aquatic habitat would qualify for the net benefit to the environment principle.

2. *Assurances to CALFED Agencies.* Participating local public agencies will not interfere with restoration activities within their jurisdiction. Local public agencies will, to the extent reasonably practicable and consistent with their other activities,

facilitate restoration activities on lands within their jurisdiction.

3. *Special Assurances for Fish Screen Program.*

These special assurances would apply to water diverters who might install fish screens to protect listed species in the Central Valley and Delta. These assurances refine the general discussion of assurances that would apply to all CALFED activities.

1. *Assurances to Diverters.*

1. *No Change in Diversions.* Diverters participating in the Program will not be required to change the magnitude, location or timing of diversions. The construction of a fish screen shall be accomplished in the manner that minimizes impacts on the diverter. CALFED will, if necessary, construct temporary diversion works.
2. *No Surprises.* In the event that changes may be required in the fish screen after construction due to new listed species or new information about covered species, the diverter shall be protected under the "no surprises" policy.
3. *Incidental Take Authorization.* Local public agencies participating in the Program will be given incidental take authority under section 10 of the federal Endangered Species Act and under the California Endangered Species Act for the incidental or accidental take of covered species, provided that the take is the result of the routine and ongoing activities of that agency.
4. *Incremental Costs Borne by CALFED.* The incremental costs to a diverter from the fish screening program shall be borne by CALFED agencies.
5. *Net Benefit to the Environment.* The net benefit to the environment principle would apply to fish screening projects in the manner described above in the context of the general conservation program.
6. *Liability Protection.* CALFED and/or its member agencies agree to indemnify, defend, and hold the diverter harmless for any losses that may occur as a result of the diverter agreeing to participate in the Program.

2. *Assurances to CALFED Agencies.*

1. *Agreement to Screen Diversions.* At such time as CALFED deems appropriate, CALFED will undertake to screen the diversion at its own cost.
2. *Participation in Screening.* Diverters will, to the extent reasonably practicable and consistent with their other activities, facilitate screening activities on lands within their service area.

4. *Implementation.* The assurances program will be implemented by a series of implementing agreements. These agreements may be of two types: programmatic agreements between CALFED and local public agencies or specific agreements between CALFED and individual landowners. In the case of programmatic agreements, it would be anticipated that the local public agency would then enter into subagreements with individual landowners. Implementing agreements would be entered into under the authority of the "no surprises" policy and "safe harbors" draft policy, as well as the federal government's general conservation authority under section 10(a).

In order to facilitate implementation of the CALFED program and simultaneously protect local interests, CALFED should establish local advisory bodies composed of local, state and federal agencies, water suppliers, landowners, and other interested parties. These local advisory bodies would be appointed by county boards of supervisors and would function in the same manner as the SB 1086 Sacramento River Advisory Council.